

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TODD BIGELOW,

Plaintiff,

- against -

BARSTOOL SPORTS, INC.

Defendant.

Docket No. 17-cv-6298-DLC

JURY TRIAL DEMANDED

ANSWER AND AFFIRMATIVE DEFENSES
OF BARSTOOL SPORTS, INC.

Defendant Barstool Sports, Inc. (“Defendant”), by and through its counsel Katten Muchin Rosenman LLP, answers the Complaint filed by plaintiff Todd Bigelow (“Plaintiff”) as follows:

NATURE OF THE ACTION

1. Defendant admits that Plaintiff seeks to recover for copyright infringement under Section 501 of the Copyright Act. Defendant further admits that Plaintiff seeks monetary relief under the Copyright Act in this action. Except as admitted, the allegations of Paragraph 1 are denied.

JURISDICTION AND VENUE

2. Defendant admits that, upon information and belief, this Court has subject matter jurisdiction of this action.

3. Defendant admits that it resides in New York State, that it conducts business in New York State and that, upon information and belief, this Court has general personal jurisdiction over Defendant. Except as admitted, the allegations of Paragraph 3 are denied.

4. Defendant admits that, upon information and belief, venue is proper in this district.

PARTIES

5. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 5 and thus denies the same.

6. Defendant admits that it is a corporation incorporated in the State of Delaware, with a place of business at 15 West 27th Street, New York, New York 10001. Defendant admits that it is registered to do business in the State of New York. Defendant further admits that, at all times material to the allegations in the Complaint, it owned and/or operated the Website. Except as admitted, the allegations of Paragraph 6 are denied.

STATEMENT OF FACTS

A. Background and Plaintiff's Ownership of the Photographs

7. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 7 and thus denies the same.

8. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 8 and thus denies the same.

9. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 9 and thus denies the same.

B. Defendant's Infringing Activities

10. Defendant admits that it exhibited a blog post on the Website entitled *The Erin Hills Show; A Full U.S. Open Preview*. Defendant denies the remaining allegations set forth in Paragraph 10.

11. Defendant denies the allegations set forth in Paragraph 11.

CLAIM FOR RELIEF **(COPYRIGHT INFRINGEMENT AGAINST BARSTOOL)** **(17 U.S.C. §§ 106, 501)**

12. Defendant's answers to Paragraphs 1 through 11 are realleged and incorporated by reference herein.

13. Defendant denies the allegations set forth in Paragraph 13.

14. Defendant denies the allegations set forth in Paragraph 14.

15. Defendant denies the allegations set forth in Paragraph 15.

16. Defendant denies the allegations set forth in Paragraph 16.

17. Defendant denies the allegations set forth in Paragraph 17.

AFFIRMATIVE DEFENSES

Defendant's investigation of the facts alleged in the Complaint is ongoing, and accordingly, Defendant reserves the right to amend its Answer and assert additional affirmative and other defenses that may be revealed during the course of discovery or other investigation. In asserting the following defenses, Defendant does not intend to suggest that matters designated herein as "defenses" are not elements of the Plaintiff's *prima facie* case on any of the Plaintiff's purported claims or that they are not matters as to which the Plaintiff bears the burden of proof. These defenses are set forth cumulatively and in the alternative. Defendant states the following affirmative and other defenses:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

18. The claims asserted in the Complaint against Defendant fail to allege facts sufficient to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Fair Use)

19. Pursuant to 17 U.S.C. § 107, Plaintiff's recovery is barred by the doctrine of fair use.

THIRD AFFIRMATIVE DEFENSE

(First Amendment)

20. Plaintiff is barred from obtaining the relief he seeks by the First Amendment to the Constitution of the United States of America.

FOURTH AFFIRMATIVE DEFENSE

(Invalid Copyright)

21. Plaintiff's claims are barred, in whole or in part, because the alleged copyright registration at issue is invalid.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Registration)

22. Plaintiff's claims are barred, in whole or in part, because one or more of the allegedly copyrighted works at issue are not registered with the United States Copyright Office.

SIXTH AFFIRMATIVE DEFENSE

(No Statutory Damages)

23. Plaintiff is precluded from recovering statutory damages or attorney's fees for copyright infringement by virtue of 17 U.S.C. § 412.

SEVENTH AFFIRMATIVE DEFENSE

(Lack of Injury)

24. Plaintiff's claims are barred, in whole or in part, because Plaintiff has not been damaged in any amount or injured in any manner or at all by reason of any act alleged against the Defendant.

EIGHTH AFFIRMATIVE DEFENSE

(Acts or Omissions of Others)

25. Plaintiff's claims fail, in whole or in part, because any wrongful act was proximately caused by the acts or omissions of persons other than Defendant and therefore, Defendant is not liable for the allegations of wrongdoing made herein.

NINTH AFFIRMATIVE DEFENSE

(Equitable Defenses)

26. Plaintiff's claims fail, in whole or in part, on the grounds of laches, estoppel, quasi-estoppel, ratification, acquiescence, waiver and/or other related equitable doctrines.

TENTH AFFIRMATIVE DEFENSE

(Apportionment)

27. Any purported damages sought by Plaintiff in the form of Defendant's profits must be apportioned based on the percentage of profits attributable to the alleged infringing conduct.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

28. Plaintiff's recovery is limited or barred due to his failure to mitigate his damages, if any.

TWELFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

29. Plaintiff's claims fail, in whole or in part, on the grounds of inequitable conduct and unclean hands.

THIRTEENTH AFFIRMATIVE DEFENSE

(Violation of Constitutional Rights)

30. To the extent Plaintiff seeks statutory damages that exceed any actual damages to Plaintiff, it violates Defendant's rights under the United States Constitution because an award of such damages would constitute an excessive fine and violate Defendant's right to procedural and substantive due process.

FOURTEENTH AFFIRMATIVE DEFENSE

(Violation of Constitutional Rights)

31. To the extent that Plaintiff seeks statutory damages, it violates Defendant's rights under the United States Constitution because of the vagueness and uncertainty of the criteria for the imposition of statutory damages and the lack of fair notice as to what conduct will result in the imposition of such damages.

PRAYER FOR RELIEF

WHEREFORE, Defendant respectfully requests that the Court enter judgment in Defendant's favor as follows:

1. Denying any and all relief sought by Plaintiff in his Complaint;
2. The Complaint, and each claim asserted therein, be dismissed with prejudice;
3. Awarding Defendant its costs of suit and reasonable attorneys' fees incurred herein; and

4. Granting Defendant all other relief that the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Defendant hereby demands a jury trial on all issues so triable.

Dated: October 13, 2017
New York, New York

KATTEN MUCHIN ROSENMAN LLP

By: 
Joshua Druckerman
575 Madison Avenue
New York, NY 10022
Telephone: (212) 940-8800
Facsimile: (212) 940-8776
joshua.druckerman@kattenlaw.com

Attorneys for Defendant